Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

No. 96-1579

IN THE

Supreme Court of the United States

October Term, 1997

JAMES BROGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner respectfully submits this brief in reply to the government's brief, which counsel received on September 29, 1997.

ARGUMENT IN REPLY

THE GOVERNMENT'S "PLAIN LANGUAGE" ARGUMENT IS ERRONEOUS BECAUSE IT IGNORES WHAT THIS AND OTHER COURTS HAVE FOUND TO BE THE PURPOSE OF 18 U.S.C. § 1001.

While making "a fortress out of the dictionary," *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), the government argues that the "plain language" of section 1001 embraces Petitioner's conduct, and that this Court should look no further in deciding this case. Respondent's Brief (hereinafter "Res. Br.") at 10-12.

The government's argument fails to recognize that the "plain language" approach is entirely inappropriate where its use would produce results "foreign to the legislative purpose," *Sorrells v. United States*, 287 U.S. 435, 450 (1932), or "'frustrate Congress's clear intention,'" *Hubbard v. United States*, 115 S. Ct. 1754, 1759 (1995) (quoting *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1778 (1994) (Souter, J., dissenting)). Because the approach urged by the government runs afoul of these principles, it must be rejected.

The purpose for which section 1001 was enacted, and that it is intended to serve, is beyond controversy. Section 1001 "was designed 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices [the statute] described.'" *United States v. Woodward*, 469 U.S. 105, 109

(1985) (citing *United States v. Gilliland*, 312 U.S. 86, 93 (1941)). The government's emphasis on dictionary definitions is inappropriate in this case: by taking a strict literalist approach to the statute, the government effectively has divorced the statute's meaning from its intended purpose.[1] "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

[1]Even pursuant to the strict literalist approach, Brogan's simple "no" response would not fall under the proscription of the language of the applicable version of section 1001. That statute referred to "statements or representations," in the plural, rather than to a "statement or representation," in the singular. Brogan's "no" cannot be interpreted either as a "statements" or as a "representations." *Cf. Metropolitan Stevedore Company v. Rambo*, 515 U.S. 291, 296-98 (1995) ("The use of 'conditions,' a word in the plural, suggests that Congress did not intend to limit the bases for modifying awards to a single condition . . . .").

THE GOVERNMENT'S SURVEY OF EXCULPATORY NO JURISPRUDENCE, PURPORTEDLY ANALYZING THE NUANCES OF VARIATION AMONG THE CIRCUITS ACCEPTING AND APPLYING THE DOCTRINE, IS GRATUITOUS AND IRRELEVANT: PETITIONER'S SIMPLE "NO" RESPONSE WOULD HAVE UNDISPUTEDLY BARRED HIS CONVICTION IN ANY OF THOSE CIRCUITS.

After noting the forty-year history of the exculpatory no doctrine's acceptance in the federal courts, Petitioner, in his brief, states:

> The courts provided numerous well-reasoned and valid justifications for the proposition that an exculpatory no response is not cognizable under 18 U.S.C. § 1001; while the criteria, or tests, employed by the different courts had a certain degree of variation, Brogan's conduct, his verbal "no" response, and the context in which it occurred, would have been found non-criminal, as a matter of law, by any of the courts that had decided the issue.

Petitioner's Brief (hereinafter "Pet. Br.") at 4-5. Petitioner continues:

> Although there are variations in scope and differences in the legal tests employed by the circuits, undoubtedly all of the courts that have recognized the doctrine would have found that the proscription of the statute did not include Brogan's conduct, the mere utterance of the word "no."

Pet. Br. at 7-8.

Ignoring these passages, the government launches into a lengthy dissertation, consuming one-third of its Argument, endeavoring to establish what Petitioner has never disputed, and in fact has clearly acknowledged: that "there are variations in scope and differences in the legal tests employed by the circuits."

Because the analysis is so utterly irrelevant, yet discussed at such great length, the only sense that can be made of its inclusion in the government's brief is that it is calculated to create apprehension that should this Court embrace the doctrine there would be the need to fashion a complicated rule or test whose interpretation by the lower courts would wreak havoc and generate endless litigation. Nothing could be further from the truth.

To embrace the exculpatory no doctrine in a sound and sensible way that is narrow, coherent, free of complexity in application, and yet fully addresses the concerns that have been voiced by courts and commentators, all this Court need hold is that section 1001 does not reach conduct that consists merely of an individual's "no" response when asked if he or she has committed a specified crime.

THE RELIANCE BY THE GOVERNMENT ON *BRYSON*, *WONG* AND *KNOX* IS MISPLACED: THOSE CASES ARE READILY DISTINGUISHABLE FROM PETITIONER'S.

Petitioner was the victim of a surprise visit by agents who, without first advising him of his right to remain silent or that it was a crime to lie to their inquiries, asked if he had accepted bribes. His "no" response was the product of these very specific circumstances, which constitute the operative facts of this case. Based upon these operative facts, Petitioner argues in his main brief that his "no" response was not actionable.

In a flawed effort to undermine the validity of Petitioner's argument, the government relies upon *Bryson v. United States*, 396 U.S. 64 (1969), *United States v. Knox*, 396 U.S. 77 (1969), and *United States v. Wong*, 431 U.S. 174 (1977). The reliance is misplaced, as each of these cases is readily distinguishable from Petitioner's.

In *Bryson*, the factual basis for the defendant's section 1001 conviction was his filing of an affidavit with the NLRB in which he falsely stated that he was not a communist. Bryson challenged his conviction on the ground that the statute requiring the filing of the affidavit was unconstitutional. The Court affirmed the conviction, holding that the constitutionality of the filing statute was not relevant to the validity of the conviction.

In *Knox*, the defendant's section 1001 conviction was based upon his filing a tax return, pursuant to the wagering tax laws, that contained false information. Like Bryson, Knox challenged his conviction on the ground that the law requiring the filing was unconstitutional. In *Knox*, the Court also held that the constitutionality of the filing statute was not relevant to the validity of his conviction.

In *Wong*, at issue was the propriety of the defendant's perjury conviction under 18 U.S.C. § 1623. The defendant, whose knowledge of English was limited, testified falsely before a grand jury. Though advised of her Fifth Amendment right against self-incrimination, the Court found that she did not understand the warning and that she believed she was required to answer all questions posed. However, the Court found that Wong understood the oath she had taken to tell the truth, and that she knew that lying to the grand jury constituted punishable criminal conduct.

In neither *Bryson* nor *Knox* were the false statements the product of the defendant having been taken by surprise by federal agents and cornered. The defendants in both cases made the statements, which were written, in an atmosphere apparently free of any coercive influence or intimidation. In *Bryson*, the false statement appeared in an affidavit, a document whose form unequivocally conveys to the affiant that it is a sworn statement, and, consequently, that false statements appearing in it can be the subject of criminal prosecution. This Court may take judicial notice that the tax form in *Knox*, undoubtedly, also contained a warning that false statements are punishable by criminal sanctions. Most significantly, in both *Bryson* and *Knox* the defendants had viable and traditional ways of contesting the constitutionality of the statutes that required the filings of the documents they submitted: namely, the commencement of legal proceedings. In sum, no valid comparison can be made between the cases of *Bryson* and *Knox* on the one hand, and that of Petitioner on the other.[2]

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[2]In *United States v. Payne*, 750 F.2d 844 (8th Cir. 1985), the court rejected the notion that *Bryson* or *Knox* presented a bar to application of the exculpatory no doctrine. Regarding *Bryson*, the *Payne* court stated

Wong also is easily distinguishable from Petitioner's case. The defendant in *Wong* was not the victim of a surprise knock in the night by federal agents, with that scenario's inherent aura of intimidation. She was before the grand jury pursuant to a subpoena, which provided her with advance notice of the time and place for her questioning. While she did not understand that she had a Fifth Amendment right to refuse to answer questions, it is undisputed that "she took the oath to the tell the truth," *id.* at 178, with its accompanying solemn ritual, understood its significance, and entertained no doubt that false responses to questions posed could result in a perjury prosecution. Moreover, the fact that *Wong* was a perjury prosecution is not an insignificant distinguishing factor. Perjury has the potential to undermine our very system of justice. *See, e.g., In re Michael*, 326 U.S. 224, 228 (1945) (Black, J.) ("All perjured relevant testimony is at war with justice . . . .").

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that the "defendant's constitutional challenge was based on the Bill of Attainder Clause, the First Amendment, and the Due Process Clause, not the Fifth Amendment self-incrimination privilege." *Id.* at 862. Regarding *Knox*, the *Payne* court stated that "[t]he Court simply held that the claim should not have been resolved at the pleading stage." *Id.* Additionally, the statements at issue in *Bryson* and *Knox* were made not in response to investigative inquiries, but rather to inquiries representing "routine exercises of administrative authority." *See United States v. Cogdell*, 844 F.2d 179, 184 (4th Cir. 1988) ("False statements that pervert an agency's routine administrative functions are the specific target Congress intended the statute to reach, *United States v. Gilliland*, 312 U.S. [at 93], while the exception was created to protect negative responses to interrogation by a criminal investigator.") *See also United States v. White*, 887 F.2d 267, 274 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("[T]he doctrine, in any event, does not shield from prosecution under section 1001 false responses to questions in an administrative rather than investigative proceeding.").

Thus, the government's reliance on *Wong* to support Petitioner's conviction is considerably wide of the mark.

CONCLUSION

For the foregoing reasons, and those previously argued in Petitioner's Brief on the Merits, Petitioner requests this Court to reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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October 29, 1997